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NO. 80-914

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RICHARD S. COHEN, ATTORNEY GENERAL,
STATE OF MAINE,

Petitioner,

v.

EQUIFAX SERVICES, INC.,
FRANK W. ROBINSON AND PAUL D. WEEKS,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

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STATEMENT OF THE FACTS

Although Petitioner has generally described the facts which are material to the consideration of the questions presented, a number of aspects of his statement are objected to by Respondents as not being established in the record below.

In Petitioner's Statement of the Case, the "purpose" of the Maine Fair Credit Reporting Act, 10 M.R.S.A. §1311 et seq. (hereinafter the "Maine Act") is alleged to have been set forth in a "statement of legislative intent which accompanies the

original bill." Petition, p. 5.[1] By citation to this "statement" Petitioner infers both that it was part of the record below, and that it represents a statement by the Maine legislature of its purpose and intent in passing the Maine Act. The "Statement of Fact" cited is nothing more than a description by the author of the bill of his motivations in introducing it, which is required in Maine to be appended to all legislative documents submitted for consideration. It is not a statement by the Legislature itself. It is significant to note that the Maine Legislature chose not to include any of the author's stated purposes in a preamble to the law as passed, in the manner that Congress included a preamble in the Federal Fair Credit Reporting Act. 15 U.S.C. §1681.

Respondents object to the Statement's use in the Petition since it was never made a part of the record below. It was never introduced into evidence and should not be judicially noticed. Under the Maine Rules of Evidence, Rule 201, courts are only permitted to take judicial notice of so-called adjudicative facts. That Rule states:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Maine Rules of Evidence 201.

Under this Rule, the Maine courts are not permitted to take notice of so-called "legislative facts" which tend to "hinge on social, economic, or political facts." R. Field and P. Murray, *Maine Evidence*, "Adviser's Notes" to Rule 201, p. 27. Certainly the "Statement of Fact" does not fall under the rubric for judicial notice of adjudicative facts. Rule 1005 of the Maine Rules of Evidence provides that public records (such as legislative documents) be introduced into evidence by copy. This is consistent

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[1]Citations to the Petition shall be as shown. Citations to the Opinion of the Maine Supreme Court and Superior Court shall be to the Appendix filed with the Petition as follows: App., p. .

with long standing common law in Maine which has denied judicial notice of private and special acts of the legislative (*Proprietors of Fryeburg Canal v. Frye*, 5 Me. 38, 43 (1827)), and of municipal ordinances (*Summit Realty, Inc. v. Gipe*, 315 A.2d 428, 429-30 (Me. 1974)), and other such matters. The record below is clear that Petitioner never introduced this statement of fact into evidence. It cannot now be cited by Petitioner as "evidence" of legislative intent. The Maine Supreme Judicial Court has indicated that "the Legislature can be motivated by plural objectives in promulgating a law." *State of Maine v. Seaburg*, 154 Me. 210, 212 (1958). It is therefore dangerous to look only to the stated purpose of the bill's author. While legislative history is certainly useful in developing legislative intent, that history must be introduced properly before it may be considered.

The Maine Supreme Judicial Court in this case did, upon examination of the statute, make a finding of the legislative intent in passing at least one of the provisions in question here. They held that:

> the regulatory approach in §1321 manifests a governmental conception that in order to prevent intrusions upon 'privacy' by unlawful discrimination and improperly influenced decision-making, it is necessary to exclude entirely various items of information from the consideration of users and, therefore, to require the purging of such data from consumer agency reports. App., at A-29.

This is, at most, the only legislative purpose which can be now cited for this Court's consideration. The legislative purpose proffered by Petitioner is not properly before this Court.

Another aspect of the Petition's Statement of the Case should be clarified. Petitioner attempts to distinguish a "consumer report" from an "investigative consumer report" by indicating that the investigative type is "a consumer report which includes information bearing on a consumer's character, general reputation, personal characteristics or mode of living which is obtained from neighbors, friends, or associates of the consumer." Petition, p.6. However, under the particular definition of the Maine Act,

information on the consumer's "character, general reputation, personal characteristics or mode of living" does not necessarily need to be obtained from "neighbors, friends, or associates of the consumer" in order to bring the report into the investigative category. The Maine Act, at 10 M.R.S.A. §1312(7), indicates that a report containing information on a consumer's personal characteristics will still be an "investigative report" even if the report is not obtained from neighbors but if the information is obtained "by other means." Thus, investigative consumer reports, the type regulated by the sections of the Maine Act in question, could consist merely of information on an individual's driving record obtained from public records, or from newspaper clippings. For instance, a report which indicates that a person has been convicted twice of reckless driving and which cites two newspaper articles and the State Motor Vehicle Records to that effect, would be a "investigative consumer report" under the definitions of the Maine Act and therefore could not be disseminated to an automobile insurance company unless the applicant for insurance had first given his written consent to disclosure of that information. Respondent believes that the Court should clearly understand that the regulations involved here are not limited only to so-called "subjective" information obtained from neighbors, but in fact cover every report which involves the "consumer's character, general reputation, personal characteristics or mode of living" even through those reports are truthful, accurate, and obtained from the public records.

REASONS FOR DENYING THE WRIT

I. The Maine Supreme Judicial Court Correctly Applied This Court's Opinions Regarding First Amendment Protection For "Commercial Speech"

Petitioner has urged this Court to grant certiorari on the ground that the Maine Supreme Judicial Court incorrectly applied to consumer reports this Court's "commercial speech" doctrine as most recently summarized in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, ___U.S. ___, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Respondents believe that the opinion of the Maine Supreme Judicial Court

correctly utilized that "commercial speech" doctrine. Petitioner attempts to distinguish consumer reports from "advertising" since this Court's decisions involving commercial speech have primarily involved advertising issues. Petitioner argues that because of an alleged functional difference, the First Amendment protection accorded advertising should not be accorded to consumer reports. Petition, p. 8. Respondents disagree.

Petitioner ignores the breadth of this Court's rulings regarding commercial speech by attempting to limit protection to advertising alone. As Respondents read the Court's decisions in this area, "commercial speech" has been broadly defined as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas, supra,* ____U.S. at ____; 100 S.Ct. at _____, 65 L.Ed.2d at 348. While advertising falls within this area, so do many other forms of speech, such as proxy statements or corporate annual reports. *First National Bank of Boston v. Francis X. Bellotti,* 435 U.S. 765, 802 (1978) (White, J., dissenting). Certainly consumer reports are also included. They are written reports which are prepared by the consumer reporting agency for a fee at the request of an authorized customer intended for the use of the ordering insurance company, employer or business in making their business decisions.

For many years this court utilized "commercial speech" as a catchword to identify that business oriented speech whose content lacked the social, political or religious content of a novel, newspaper or tract, and so deprived it of the protection of the First Amendment. *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942). In the years between *Valentine* and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), which overturned *Valentine,* many forms of communication were singled out as "commercial speech," including consumer reports. e.g., *Millstone v. O'Hanlon Reports, Inc.,* 528 F. 2d 829 (8th Cir. 1976). However, this court recognized in *Virginia Pharmacy, supra,* that forms of expression which are important to the functioning of our economy are worthy of a limited measure of First Amendment protection. Because of the role that free enterprise plays in our society, any speech which aids in making informed business judgments should be protected.

Advertising is certainly not the sole form of communication which meets this test.

The fundamental justification for First Amendment protection to commercial speech rests on the theory that:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. *Virginia Pharmacy, supra,* at 765.

In reaching this conclusion this Court relied upon and cited Justice Douglas' dissent from denial of certiorari in *Dunn & Bradstreet, Inc. v. C. R. Grove,* 404 U.S. 898 (1971). That case involved consumer reports. In part, Justice Douglas stated,

> When immersed in a free flow of commercial information, private sector decision making is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. . . . The financial data circulated by Dunn & Bradstreet, Inc. are part of the fabric of national commercial communication. . . . Presumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion . . . arising out of a squabble over whether a vendor had sold obscene magazines. *Id.* at 905-906 (Douglas, J. dissenting).

Citation to this opinion as authority for overturning long standing court doctrine would be strange if the subject of the opinion, consumer reports, were to still be deprived First Amendment protection. This Court has recognized in its commercial speech decisions a protection for various kinds of commercial speech whether that speech be aimed at the individual purchasing decisions of private individuals or whether it constitutes information supplied to businesses who make insurance, employment, and

credit decisions about those consumers. Both forms of commercial speech are indispensable to a free market economy. It is clear that the court's "commercial speech" doctrine does encompass consumer reports.

However, Petitioner attempts to distinguish consumer reports from protected forms of commercial speech by focusing on the audience of such reports. Petition, p. 9. Petitioner seeks to build a difference on the fact that advertising, unlike consumer reports, is supposedly aimed at "consumers" who are making decisions about which toothpaste to use, or deciding whether one can successfully combine a detergent and fabric softener in one liquid. Consumer reports, on the other hand, are different Petitioner argues, in that the "consumer" is the subject of the speech made to a "third party." Petition, p. 9. Respondents believe that this view blindly concentrates on the "consumer" as an individual person, and overlooks the fact that insurance companies or employers are in fact consumers of the reports Respondent Equifax produces. Corporate and business entities have the right to receive truthful and accurate information about individuals who have applied to them for a benefit, as much as consumers have the right to know about brands of bread and butter. This court's commercial speech doctrine is not limited to "hawking of wares" to individual persons (*Bellotti, supra,* at 783 n. 20) but rather encompasses any speech which "serves individual and societal interests in assuring informed and reliable decision making." *Bates and O'Steen v. State Bar of Arizona,* 433 U.S. 350, 364 (1977).

It is important to note that the actual question of whether an individual purchases Tide or Fab, is of little importance to anyone but that person and perhaps to those wearing the clothes he or she washes. But in the aggregate, millions of individual purchasing decisions such as that may affect the employment of thousands or the price for detergents nationally. Similarly, a single consumer report regarding the health of an applicant for life insurance, his smoking habit, or driving record, may not impact anyone but the applicant. But taken in the aggregate, millions of such reports affect the cost of insurance to everyone. When provided with accurate information on applicants, insurance

companies can correctly categorize risks and assign higher premiums to those who engender, through their health or avocations, higher risks, and lower premiums to those who pose lower risks. Without this information the premiums for high risks would be borne by everyone and the cost of insurance to the vast majority of applicants would increase. cf. App., at p. A-18 n.9. Credit and employment reports in the aggregate have a similar impact on the cost of goods and services. It is this impact upon the economy which mandates that decisions by businesses be intelligent and well informed. Consumer reports are prepared to that end. The importance of consumer reports to the national economy has been recognized by Congress in its findings regarding the Federal Fair Credit Reporting Act. 15 U.S.C. §1681(a)(3). See *Tureen v. Equifax, Inc.*, 571 F.2d 411, 416 (8th Cir. 1978). The Maine Supreme Judicial Court recognized the importance of consumer reports as "an important source of information through which users seek to obtain information to assist them in making decisions incident to the conduct of their businesses." App., at A-5. The distinction Petitioner attempts to develop between these reports and advertising does not withstand analysis. Even admitting that the audience or subject matter of consumer reports are different from advertising, this fact does not *a fortiori* annul the reports' vital function in our economy and concommitant First Amendment protection.

A number of other statements made by Petitioner in support of granting the writ need to be clarified. Petitioner states that,

> Presumably, the consumer understands that when he applies for insurance, credit, or employment, information concerning his economic reliability may be collected and evaluated. However, the consumer may not understand that, absent regulatory legislation, an investigative consumer report may contain such matter as the opinion of a neighbor concerning the consumer's political beliefs and sex life. Petition, p. 9-10.

This is simply not true. First, nothing in the record suggests that consumer reports often, if ever, contain information on a person's "sex life" as Petitioner intimates. Petitioner insists here, as

he did below, on hypothecating that reports contain "sex life" data. Yet after extensive discovery in the files of Respondent Equifax no witnesses or reports demonstrating such data were ever introduced. App., p. A-9. Petitioner is using the exception as though it were the rule in an inflamatory way. Most reports are prepared through public record information and personal interviews with the subject himself. App., at A-4. In addition, the consumer is notified, as required by Federal law, that a report is to be made on him. Federal Fair Credit Reporting Act, 15 U.S.C. §1681(d). This practice clearly informs him that the report may include "information as to his character, general reputation, personal characteristics, and mode of living." 15 U.S.C. §1681(d)(a)(1). The consumer is thus well aware that the report may involve his personal life.

Petitioner also states,

> In light of the fact that such personal information generally does not bear a reasonable relationship to a consumer's insurability or credit worthiness, the Maine Act supports the reasonable expectation that certain kinds of information will be kept private.

This statement is also simply contrary to the specific facts found by the Maine Supreme Judicial Court. That Court concluded that any information which does regard an applicant's personal life, (including Petitioner's examples - political beliefs or sex life,) may well bear a reasonable relationship to a consumer's insurability or credit worthiness. App. at A-30 n. 18. Based upon a distorted statement of the facts, Petitioner attempts to develop some "expectation of privacy." Yet no reasonable expectation of privacy does arise in the consumer since he is clearly informed that a consumer report can contain information regarding his private life. Additionally, since the particular sections of the Maine Law in question limit the reporting of public record information, it is clear that the law does not in fact protect any expectation of privacy. A person can have no such expectation if the information is known to all or available from public records. Petitioner also admits that the identical information barred from being reported by consumer reporting agencies can

be investigated and reported by insurance companies and employers without restriction. Petition, p. 13. It is clear that if an "expectation of privacy" in insurance or employment applications existed, this law does not protect it.

Petitioner also states that,

> Unlike individuals whose activities are reported in the mass media, the subject of consumer reports do not have direct access to the information disseminated concerning them. Petition, p. 10.

This statement is simply contrary to the law itself. The Federal Fair Credit Reporting Act allows consumers to learn of the content of their report (15 U.S.C. §1681(g)) and the Maine Act additionally allows consumers to receive actual copies of their report. 10 M.R.S.A. §1316(2). Therefore, individuals certainly have as much access to consumer reports as they would to information reported in "the mass media." Petitioner also states that "the subject of an investigative consumer report cannot control the extent of the intrusion into his private life." Again, this is simply not true. First of all, no "intrusion" exists. App., at A-20. But even if it did, the consumer can choose to withdraw his application for credit or insurance rather than have a consumer investigative report done on him. If applicants wish to have life insurance, they must allow the life insurance company to collect information about them to enable the company to evaluate the risk involved in issuing the policy. To deny truthful and accurate information to an insurance company about an individual applicant simply destroys the entire underwriting process which is based upon differing scales of risk depending upon the background and facts of the individuals involved.

In general, Petitioner's first argument for granting the writ is that consumer reporting is somehow more "intrusive" on private persons than advertising and therefore such reports are more amenable to prophylactic regulation than other forms of commercial speech. Petitioner overlooks the specific findings of the Maine Supreme Judicial Court (App., at A-29-30) and the Superior Court of the State of Maine. App., at B-9. The provisions

of §1314 and §1321 are simply not tailored to prevent this alleged "intrusion." Even admitting that an "intrusion" occurs, the law bans all reports not just those which contain subjective data acquired from neighbors. The definition of "consumer investigative report" not only covers reports based on information obtained "through personal interviews with neighbors, friends or associates" but additionally covers reports containing any information on the consumer's "character, general reputation, personal characteristics or mode of living," obtained "by other means" as well. 10 M.R.S.A. §1312(7). Thus, investigative reports containing public record information, information voluntarily supplied by the consumer, or gleaned from newspaper clippings, are prohibited or strictly limited under the challenged provisions. This Court has established that privacy interests fade when information is made a part of the public record. *Cox Broadcasting v. Cohen,* 420 U.S. 269, 296 (1975). The Petitioner has failed to produce any evidence in the court below, or in the appendix for this Court's benefit, which shows that consumer reporting is so "intrusive" on a consumer's "privacy" to justify a complete prophylactic ban of all reprots including those containing information derived solely from public record information or obtained voluntarily from the consumer himself. For this reason, the first argument of Petitioner does not warrant issuance of the writ.

II. The Maine Supreme Judicial Court Correctly Assessed the State's Interest in Protecting Personal Privacy to be Insufficient to Justify §§1314 and 1321 of the Maine Act

In assessing the constitutionality of the Maine Fair Credit Reporting Act and in particular, 10 M.R.S.A. §1314 and §1321, the Maine Supreme Judicial Court utilized the four-part test established in *Central Hudson Gas and Electric Corp., supra.* Petitioner now asserts that the court improperly applied the test in determining whether a "substantial governmental interest" was asserted by the State to justify this law. In the courts below, Petitioner asserted that "privacy" of consumers justified the complete suppression of consumer reports unless the consumer consented to the reports. Even when the consumer had consented, this "privacy interest," Petitioner argued, also justified

total suppression of certain categories of "prohibited" information. Privacy was so substantial an interest, that even truthful, relevant and not misleading information obtained from public records had to be circumscribed.

Petitioner sought in the Superior and Supreme Courts of Maine to demonstrate the existence of this substantial interest by citing "the constitutional and tort law protections afforded privacy." App., at A-19. Having been rebuffed in this attempt to justify the law, Petitioner now criticizes the Supreme Judicial Court for examining the very tort law and constitutional concepts he previously cited. Petition, at p. 11. Petitioner now claims that some other elusive privacy interest which is substantial and which justifies the law lurks within the provisions of the Maine Fair Credit Reporting Act. The error Petitioner asks this Court to overturn was the failure of the Maine Supreme Judicial Court to find this interest and to label it as "substantial."

Yet, if there was some substantial intrusion on the privacy of consumers, which is inherent in the nature of all consumer reports, Petitioner failed utterly to present evidence of this in the court below. The findings of the Supreme Judicial Court and of the Superior Court belie Petitioner's argument that a substantial privacy interest existed to justify the suppression of consumer reports. App., at A-17, A-17 n. 9, A-18, B-7-B-11. Despite extensive discovery by Petitioner in the files of Respondent Equifax, not one report was introduced, and not one witness was offered to demonstrate the intrusion now offered as a "substantial" state interest. App., at A-9. It is little wonder that the Maine Supreme Judicial Court could look only to tort or constitutional law to find a privacy interest. Only in those areas could one arguably find an interest of substance rather than imagination.

The Petitioner has continued to believe that in analyzing commercial speech cases, the state need only hypothecate a substantial interest in order to justify its regulations. This is why Petitioner only states that consumer reports intrude on privacy, rather than demonstrating that they do. Yet the decisions of this Court have consistently held that " . . . it is clear that commercial speech cannot be banned because of an unsubstantiated

belief that its impact is detrimental." *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85, 92 n. 6 (1977). Accord *Friedman v. Rogers,* 440 U.S. 1, 13 (1979). The Maine Supreme Judicial Court rightly refused to accept Petitioner's presumptions about the privacy impact of consumer reports. App., at A-17-A-18. Petitioner's present position is no stronger. The only substantial privacy interest which can be asserted given the facts in the record are the areas of constitutional and tort law, and Petitioner does not challenge the Maine Supreme Judicial Court's finding that they do not justify the proscriptions of §1314 and §1321.

Petitioner's argument also creates a "red herring" of sorts. Even if Petitioner were right about this "privacy interest," it would still not be sufficient to justify the provisions in question. In *Central Hudson Gas, supra,* this Court indicated that to be protected "commercial speech" must be determined at least to "concern lawful activity and not be misleading." *Id.* _____U.S. at _____ ; 65 L.Ed.2d at 351. The Maine Supreme Judicial Court did find that on the basis of the overwhelming evidence in the record before it, consumer reports were neither unlawful in and of themselves nor misleading. On the contrary, consumer reports were found to be, in a vast majority of cases, truthful and accurate. App., at A-17. In this situation, *Central Hudson Gas* required a showing of a "substantial governmental interest" in order to supress the speech. *Id.* Petitioner now asserts that the "substantial governmental interest" he proffered to justify the law was improperly rejected by the Maine Supreme Judicial Court. However, even assuming that the court had accepted the justification advanced, the doctrine of *Central Hudson Gas* still required that the court determine whether, "the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* As the decision of the Maine Supreme Judicial Court demonstrates, the provisions of §§1314 and 1321 were found not to directly advance the governmental interest of "privacy" which had been asserted, and to be broader than necessary to serve that interest. App., at A-17. Thus, even if Petitioner is correct, which Respondent denies, that a substantial governmental interest was asserted, Petitioner has not

demonstrated that the court was in error in overturning these sections for failure of the provisions to satisfy the third and fourth tests set forth in *Central Hudson Gas.* Petitioner's new "privacy interest" still is not served by restricting public record information since it is not private information. And this total supression of reports is far broader than necessary to achieve protection of even this new "privacy" interest. For this reason, there is no reason for granting the petition.

It is important to note that the interpretation and construction of Maine statutes and law rests in the Maine Supreme Judicial Court and not in this Court. *Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975). The Maine Supreme Judicial Court has interpreted the statutes and common law of Maine, including the Maine Fair Credit Reporting Act at issue here, as not establishing any "substantial interest" of the type now asserted by Petitioner. And the views and findings of the Maine Supreme Judicial Court regarding the nature of the interest sought to be served by the statute also deserves careful consideration. *Rundlett v. Oliver,* 607 F.2d 495, 500-502 (1st Cir. 1979).

The record clearly did not show, as Petitioner now claims, that the interviews sometimes used in preparing reports "intrude directly upon the persons being interviewed" or that "questions asked during an investigation may elicit information not reasonably relevant to the economic purpose underlying the report." Petition, p. 12. On the contrary, the specific facts of this case as found by the Maine Supreme Judicial Court demonstrate that reports most often elicit information which is publicly known and which is reasonably relevant to the economic purpose of the report. App., p. A30 - A31. Thus, the assertion in the petition that, "inappropriate information" is disseminated so that an invasion of the "privacy of the consumer" occurs which "may result in reputational injury" (Petition, p. 12) is simply contrary to the facts of this case. The Court should also be aware that "dissemination" of reports is strictly limited under the Federal and Maine Fair Credit Reporting Acts. 15 U.S.C. §1681 (b); 10 M.R.S.A. §1313.

Petitioner also claims that the prohibitions over reporting

certain categories of information found in §1321 of the Maine Act are the

> only effective way of enforcing this legislative judgement . . . that certain categories of information, such as race, religion, and ethnic origin, are not appropriately contained in reports intended to aid in the assessment of a consumer's eligibility for insurance, employment, or credit. Petition, p. 13.

However, Petitioner again, as he did in the courts below, fails to realize that no clear legislative judgment regarding the use of such information has been made. On the contrary, as Petitioner admits "insurance companies, banks, etc. . . . remain free to collect and use any information they deem appropriate." Petition, p. 13. No law in the State of Maine makes use of such information in insurance decisions illegal. cf. Maine Human Rights Act, 5 M.R.S.A. §4552. Therefore, §1321 simply could not have been designed to achieve the so-called "legislative judgment" which Petitioner asserts was made. Additionally, the Maine Supreme Judicial Court did not find such a legislative judgment had been made. App., at A-31-33, and its findings should be accorded great weight. *Rundlett v. Oliver, supra.* Petitioner's additional assertion that this so-called "interest" of the State in limiting the information upon which business judgments are made to only "relevant" information or "appropriate information," can only be furthered by a blanket restriction on consumer reporting is simply contrary to common sense. The Maine Supreme Judicial Court pointed this out in its decision. App., A-32.

One last point might be made. The Petition mentions the Federal Fair Credit Reporting Act, 15 U.S.C. §1681, et. seq., and the Maine Act. This Court should understand that the consumer reporting industry is already heavily regulated as a review of these acts will show. The purpose, use, and methods of reporting are all clearly restricted by these laws. The further need of such extensive content based restrictions on reports as found in the challenged sections is difficult to justify given the existing regulation which covers the reporting industry.

Petitioner's second reason for granting the writ appears to be based solely upon evidence not part of the record, and directly contrary to the Maine Supreme Judicial Court's findings.

III. No Important Question of Federal Law Exists in this Case.

Petitioner attempts to develop an "important question of Federal law" out of the issues involved in this case. However, Respondents believe that the decision in this case is consistent with *Central Hudson Gas, supra,* and the other rulings of this Court and that clarification with regard to consumer reports is not necessary.

Petitioner also attempts to argue that provisions in the laws of "at least 13 states" (Petition, p. 15) which are similar to the Maine law are now suspect. However, Petitioner has set up a straw man in these statutes since their constitutionality depends largely upon the analysis of *Central Hudson Gas, supra,* when applied to the specific facts of those statutes. It may well be that the State of New York, for instance, could demonstrate a substantial governmental interest on a record which would justify the provisions in its law. Respondent, of course, believes that such a record could not be developed because no evils of such substantial magnitude exist to justify such drastic restrictions on reporting truthful, public record information. Since the test used to determine the constitutionality of those statutes is factually based, nothing in the Maine Supreme Judicial Court's decision mandates that those other state laws would be struck down. Those questions will be left to another day, on records involving those laws.

Petitioner also attempts to develop a controversy between the decision by the Maine Supreme Judicial Court and that of the Eighth Circuit Court of Appeals in *Millstone v. O'Hanlon Reports, Inc., supra. Millstone* was decided before *Virginia Pharmacy, supra,* and the other commercial speech decisions of this Court and held that consumer reporting was not protected speech under the First Amendment. The basis of the *Millstone* decision was that consumer reports were "commercial speech" not

entitled to protection. *Id.* at 833. Most significantly, however, the law at issue in that case was the Federal Fair Credit Reporting Act. That Act does not contain anything analogous to the two provisions at issue here, 10 M.R.S.A. §1314 and §1321. Since *Millstone* did not deal with such restrictions on truthful, accurate speech, no substantial conflict between the cases exists.

Petitioner also attempts to magnify the importance of this case by arguing that its reasoning "appears to impair other well established types of economic regulation, including securities laws, labor laws, anti-trust laws, and debt collection laws, all of which limit commercial expression to some extent." Petition, at p. 17. It is not exactly clear why the reasoning of this case would so imperil such regulation since the reasoning of the Maine Supreme Judicial Court follows precisely the reasoning of the U.S. Supreme Court in *Central Hudson Gas.* Why application of an existing doctrine to consumer reports would somehow imperil "labor laws, anti-trust laws, and debt collection laws," is simply a spectre woven from whole cloth in an attempt to justify issuance of the writ of certiorari. It is useless to argue about the validity of those laws since, in those cases, the state's interest may be more substantial or the provision may be tailored to meet the evil asserted. It is mere speculation to equate provisions struck down by the Maine courts with all other forms of regulation which posses some limitation on speech. No important question of Federal law exists which would justify issuance of a writ of certiorari.

CONCLUSION

Respondents believe that Petitioner has failed to demonstrate any of the reasons set forth in Rule 17 of the Rules of this Court which might justify issuance of a writ of certiorari. No additional reasons have been offered to compel this Court's review. Therefore, Respondents respectfully request that the Petition be denied.

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